



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

**[SATS No: WY-040-FOR; Docket ID: OSM-2011-0004]**

Wyoming Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule; approval of amendment with certain exceptions.

**SUMMARY:** We are issuing a final decision on an amendment to the Wyoming regulatory program (the "Wyoming program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Our decision approves in part and disapproves in part the amendment. Wyoming proposes revisions and additions to rules concerning noncoal mine waste, valid existing rights, and individual civil penalties. Wyoming revised its program to be

consistent with the corresponding Federal regulations and SMCRA, clarify ambiguities, and improve operational efficiency.

**EFFECTIVE DATE:** [Insert date of publication in the Federal Register]

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**SUPPLEMENTARY INFORMATION:**

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- II. Submission of the Proposed Amendment
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**I. Background on the Wyoming Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface

coal mining and reclamation operations in accordance with the requirements of this Act...; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Wyoming program in the November 26, 1980, Federal Register (45 FR 78637). You can also find later actions concerning Wyoming's program and program amendments at 30 CFR 950.12, 950.15, 950.16, and 950.20.

## **II. Submission of the Proposed Amendment**

By letter dated April 28, 2011, Wyoming sent us a proposed amendment to its approved regulatory program (SATS number: WY-040-FOR, Administrative Record Docket ID No. OSM-2011-0004) under SMCRA (30 U.S.C. 1201 et seq.). Wyoming submitted the amendment partly in response to a February 13, 2008, letter that we sent to Wyoming notifying the State that the Office of Surface Mining Reclamation and Enforcement's (OSMRE) December 17, 1999, Valid Existing Rights (VER) rule changes had been upheld in court and the State should respond to our April 2, 2001, letter sent in

accordance with 30 CFR 732.17(c) ("732 letter"). That letter required Wyoming to submit amendments to ensure its program remains consistent with the Federal program. This amendment package is intended to address all required rule changes pertaining to VER. Wyoming also submitted the proposed amendment to address required program amendments at 30 CFR 950.16(r), (s), and (t), respectively, and deficiencies that we identified in a November 7, 1988, 732 letter. These included changes to Wyoming's rules for noncoal mine waste and individual civil penalties.

We announced receipt of the proposed amendment in the June 21, 2011, Federal Register (76 FR 36040). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record Document ID No. OSM-2011-0004-0001). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on July 21, 2011. We received comments from three Federal agencies (discussed under "IV. Summary and Disposition of Comments").

During our review of the amendment, we identified concerns regarding Wyoming's proposed rule changes in response to the April 2, 2001, 732 letter including revisions to its definition

of "Valid existing rights" at Chapter 1, Section 2(f1); its newly-proposed "Needed for and adjacent standard" definition at Chapter 1, Section 2(f1)(ii)(B)(IV); its newly-proposed VER standards for roads rule at Chapter 1, Section 2(f1)(iii); its procedures for public road waivers at Chapter 12, Section 1(a)(v)(D); its VER submission requirements and procedure rules at Chapter 12, Section 1(a)(vii)(A)(I) and (IV); its requirements for initial review of VER requests at Chapter 12, Section 1(a)(vii)(B)(I) and (IV); its VER public notice and comment requirements at Chapter 12, Section 1(a)(vii)(C)(I)(3.), (C)(II)(2.), and (C)(III); its rules at Chapter 12, Section 1(a)(vii)(D)(I) and (III) concerning how a VER decision will be made; its newly-proposed requirements at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations; its proposed revisions at Chapter 12, Section 1(a)(vii)(F) regarding availability of records; its newly proposed procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places at Chapter 12, Section 1(a)(vii)(G)(III)(2.); its proposed definition of "willfully" at Chapter 16, Section 4(a)(iii) in response to a November 7, 1988, 732 letter; and its newly proposed rules at Chapter 16, Section 4(b)(i) for determining when an individual civil penalty may be assessed in response to the November 7, 1988, 732 letter. We notified

Wyoming of these concerns by letter dated August 17, 2011  
(Administrative Record Document ID No. OSM-2011-0004-0009).

We delayed final rulemaking to afford Wyoming the opportunity to submit new material to address the deficiencies. Wyoming responded in a letter dated October 5, 2011, that it could not currently submit additional formal revisions to the amendment due to the administrative rulemaking requirements for promulgation of revised substantive rules (Administrative Record Document ID No. OSM-2011-0004-0010). Specifically, Wyoming explained that the required changes would be considered substantive in nature and therefore the Land Quality Division (LQD) is required to present the proposed rules to the LQD Advisory Board and then the Wyoming Environmental Quality Council for vetting. Following approval by the Governor, the rules may be submitted to OSMRE for final review. While it could not submit formal changes, Wyoming did submit informal responses to the noted concerns. Therefore, we are proceeding with the final rule Federal Register document. Our concerns and Wyoming's responses thereto are explained in detail below.

### III. OSMRE's Findings

30 CFR 732.17(h)(10) requires that State program amendments meet the criteria for approval of State programs set forth in 30 CFR 732.15, including that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of 30 CFR Part 700. In 30 CFR 730.5, OSMRE defines "consistent with" and "in accordance with" to mean (a) with regard to SMCRA, the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act and (b) with regard to the Federal regulations, the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of SMCRA.

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment with certain exceptions as described below.

#### A. Minor Revisions to Wyoming' Rules.

Wyoming proposed minor editorial and recodification changes to the following previously approved rules. No substantive changes

to the text of these regulations were proposed. Because the proposed revisions to these previously approved rules are minor, we are approving the changes and find that they are no less effective than the corresponding Federal regulations.

Chapter 1, Section 2(f1)(iii); deletion of existing "needed for and adjacent" rule due to newly-proposed rule language at Section 2(f1)(ii)(B);

Chapter 7, Section 1(a)(i)(A) and (B); recodification of existing Underground Coal Mining Permit Application Content Requirements to reflect changes resulting from WY-038-FOR;

Chapter 12, Section 1(a)(viii), (ix), (x), and (xi); and recodification of existing permitting procedure rules applicable to surface coal mine operation permit applications.

B. Revisions to Wyoming's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations.

1. Wyoming proposes additions and revisions to the following rules containing language that are the same as or similar to the corresponding sections of the Federal regulations and/or SMCRA.

We are approving the following revisions.

Chapter 1, Section 2(f1)(ii)(A) and (B)(I)-(III); VER "Good



faith/all permits" and "Needed for and adjacent" standards; [30 CFR 761.5(b)(1) and (2)(i)-(iii)];

Subsections (A)-(D) of Chapter 1, Section 2(f1)(iii); VER standard for roads; [30 CFR 761.5(c)(1)-(4)];

Chapter 10, Section 2(a); General permit requirements for exploration of more than 250 tons or in an area designated as unsuitable; [30 CFR 772.12(a)];

Chapter 10, Section 2(b)(xiii); Exploration permit application information; [30 CFR 772.12(b)(14)];

Chapter 10, Section 3(c)(iv); Approval of applications for exploration of more than 250 tons or in an area designated as unsuitable for surface coal mining operations; [30 CFR 772.12(d)(2)(iv)];

Subsections (1.)-(9.) of Chapter 12, Section 1(a)(vii)(A)(I); VER submission requirements and procedures; [30 CFR 761.16(b)(1)(i)-(ix)];

Chapter 12, Section 1(a)(vii)(A)(II)(1.)-(3.) and (III); VER submission requirements and procedures; [30 CFR 761.16(b)(2)(i)-(iii) and (3)];

Subsections (1.)-(3.) of Chapter 12, Section 1(a)(vii)(A)(IV); VER submission requirements and procedures; [30 CFR 761.16(b)(4)(i)-(iii)];

Chapter 12, Section 1(a)(vii)(B)(II) and (III); Initial review of VER request; [30 CFR 761.16(c)(2) and (3)];

Chapter 12, Section 1(a)(vii)(C)(I)(1.) and (2.); VER notice and comment requirements and procedures; [30 CFR 761.16(d)(1)(i) and (ii)];

Subsections e.-h. of Chapter 12, Section 1(a)(vii)(C)(I)(3.); VER notice and comment requirements and procedures; [30 CFR 761.16(d)(1)(v)-(viii)];

Chapter 12, Section 1(a)(vii)(C)(II)(1.); VER notice and comment requirements and procedures; [30 CFR 761.16(d)(2)(i)];

Chapter 12, Section 1(a)(vii)(D)(II); How a VER decision will be made; [30 CFR 761.16(e)(2)];

Chapter 12, Section 1(a)(vii)(D)(IV) and (V)(1.) and (2.); How a VER decision will be made; [30 CFR 761.16(e)(4) and (5)(i) and (ii)];

Chapter 12, Section 1(a)(vii)(G)(I)(1.), (2.), and (3.), (II), and (III)(1.); Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places; [30 CFR 761.17(d)(1)(i), (ii), and (iii), (2), and (3)(i)];

Chapter 16, Section 4(a)(i) and (ii)(A) and (B); definitions of "Knowingly" and "Violation, failure or refusal;" [30 CFR 701.5]; Chapter 16, Section 4(b)(ii); when an individual penalty may be assessed; [30 CFR 846.12(b)];

Chapter 16, Section 4(c)(i)(B)-(C); Amount of civil penalty; [30 CFR 846.14(a)(2)-(3)];

Chapter 16, Section 4(d)(i), (ii)(B), and (iii); Procedure for assessment of individual civil penalty; [30 CFR 846.17(a), (b)(2), and (c)]; and Chapter 16, Section 4(e)(i)-(iii); Payment of penalty; [30 CFR 846.18(a)-(c)].

2. Chapter 1, Section 2(fl)(i) and (iv)(B); Definition of "Valid Existing Rights."

In response to Items B-2 and B-5 of OSMRE's April 2, 2001, 732 letter, Wyoming proposes to delete the takings standard from its definition of VER at Chapter 1, Section 2(fl)(i) and its concept of continually created VER at Section (iv)(B). Wyoming explains in its Statement of Principle Reasons for Adoption (SOPR) that the Federal VER rules as published in 1999 (64 FR 70766) removed "the 1983 takings standard for VER" and reinstated a revised version of the 1980 good faith/all permits standard. The preamble to the 1999 VER rules indicated that the taking standard is less protective for areas under 30 CFR 761.11 than the good faith/all permits standard. The 732 letter notified Wyoming that because its "definition at (i) and (iv)(B) bases VER (except for roads) on a takings standard" the rules were less effective than the Federal definition. For these reasons, Wyoming now proposes to delete the aforementioned takings standards and include a good

faith/all permits standard in its definition of VER to be consistent with the Federal definition at 30 CFR 761.5. We agree with the rationale for Wyoming's proposed deletions and we approve them.

3. Chapter 1, Section 2(f1)(iv)(A); VER Exception for Existing Operations.

In response to Item D of OSMRE's April 2, 2001, 732 letter, Wyoming proposes to revise its rules at Chapter 1, Section 2(f1)(iv) by both identifying which operations qualify for the exception for existing operations and specifying that a person claiming VER must demonstrate the required elements as of the date that the land came under the protection of 522(e) of P.L. 95-87 or 30 CFR 761.11 rather than August 3, 1977 (the date of SMCRA's enactment). The 732 letter stated that Wyoming's definition of VER at former Chapter 1, Sec. 2(df)(iv)(A) incorporates the exception for existing operations as though it is stated as a type of VER rather than an exemption from VER. As a result, Wyoming is deleting former subsection (A) and explains in its SOPR that the VER definition was revised to be consistent with the Federal regulation at 30 CFR 761.12. Wyoming's proposed revision makes its rules substantively identical to and no less effective than the Federal regulations at 30 CFR 761.12(a) and we

approve it.

4. Chapter 12, Section 1(a)(v)(B); Procedures for Compatibility Findings.

In response to Items E-1 and G-3 of OSMRE's April 2, 2001, 732 letter, Wyoming proposes to revise its rules at Chapter 12, Section 1(a)(v)(B) by adding a cross-reference to the Federal requirements at 30 CFR 761.13 regarding procedures for compatibility findings for surface coal mining operations on Federal lands in national forests. The Federal rule clarifies that an applicant may request these findings in advance of preparing and submitting a permit application. The 732 letter indicated that although Wyoming's program incorporates the compatibility test for national forest lands as required by 30 CFR 761.11(b), it did not include the specific procedures of 30 CFR 761.13. Wyoming explains in its SOPR that subsection (B) was revised to include the necessary reference to the applicable Federal procedures for compatibility findings in order to correct the aforementioned 732 deficiencies. Wyoming's proposed revision and incorporation by reference makes its rules no less effective than the Federal regulations at 30 CFR 761.13 and we approve it.

5. Chapter 12, Section 1(a)(vi); Basic Framework for VER

## Determinations.

In response to OSMRE's April 2, 2001, 732 letter, Wyoming proposes to revise its rules at Chapter 12, Section 1(a)(vi) to be consistent with the table in the Federal regulations at 30 CFR 761.16(a) by adding a basic framework for making valid existing rights determinations. Item A-1 of the 732 letter addressed the Cooperative Agreement at 30 CFR 950.20 and required Wyoming to clarify the responsibilities for making VER determinations on Federal lands within areas protected under 30 CFR 761.11(a) and (b), and the definition to use in making those determinations. Item G stated that the Wyoming program lacked the provisions of new 761.16(a) that defines which agency is responsible for the VER determination and which definition (State or Federal) applies. Proposed subsection (vi) adds those elements by specifying that OSMRE shall be the responsible agency for making VER determinations for Federal lands described in proposed subsections (v)(A) and (B) which are the counterparts to 30 CFR 761.11(a) and (b). Proposed subsection (vi) also identifies that Wyoming (the Division) is the responsible agency for making VER determinations for non-Federal lands described in subsection (v)(A) and shall make evaluations using the Federal VER definition. Wyoming's proposed rule at Chapter 12, Section 1(a)(vi) satisfies the 732 deficiencies and is no less effective than the

counterpart Federal requirements at 30 CFR 761.16(a).

Accordingly we approve it.

C. Revisions to Wyoming's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations.

1. Chapter 1, Section 2(f1); Definition of "Valid existing rights."

In response to Item B-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its definition of VER at Chapter 1, Section 2(f1) by adding an explanation of the operation of VER and noting that operations on prohibited or limited areas under VER are still subject to the remainder of SMCRA regulations. In its SOPR, Wyoming stated that the revisions are meant to be consistent with the required elements of OSMRE's basic conceptual definition for VER in 30 CFR 761.5.

OSMRE replied in a letter dated August 17, 2011, that Wyoming's definition does not include Federal counterpart language stating that "Possession of valid existing rights only confers an exception from the prohibitions of §761.11 and 30 U.S.C.

1272(e)." We stated that Wyoming's failure to include this language in its VER definition clarifying and further explaining

the operation of VER renders its program less effective than the Federal regulations. Consequently, we required Wyoming to add the "exception" language to its proposed definition of VER.

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the required "exception" language to its VER definition in a future rule package.

Based on the discussion above, we are not approving Wyoming's revised VER definition at Chapter 1, Section 2(f1). We also acknowledge Wyoming's commitment to add the required "exception" language to its VER definition in a future rulemaking.

2. Chapter 1, Section 2(f1)(ii)(B)(IV); Definition of "Needed for and adjacent standard."

In response to Item B-5 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed a new "Needed for and adjacent standard" definition at Chapter 1, Section 2(f1)(ii)(B)(IV) and includes a requirement that, when evaluating if a person meets that standard, the agency making the decision may consider "Whether the land lies within the area identified on the life-of-mine map submitted before the land came under the protection of 30 CFR §761.11 (2009)."



OSMRE replied in a letter dated August 17, 2011, that the Federal counterpart provision at 30 CFR 761.5(b)(2) includes specific citation cross-references requiring the submission of a life-of-mine map as part of a permit application. Therefore, in order to provide specificity and maintain clarity in its VER rules, we required Wyoming to revise the proposed rule language to specify the applicable counterpart permit application reference for requiring the submission of life-of-mine maps.

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the required cross-references in a future rule package.

Consequently, we are not approving Wyoming's newly-proposed "Needed for and adjacent standard" definition at Chapter 1, Section 2(f1)(ii)(B)(IV). We also acknowledge Wyoming's commitment to add the required citation cross-references in a future rulemaking.

3. Chapter 1, Section 2(f1)(iii); VER standards for roads.

In response to Item B-5 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed a new rule at Chapter 1, Section 2(f1)(iii) that

applies the VER standard to all roads included within a surface mining operation.

OSMRE replied in a letter dated August 17, 2011, that the Federal counterpart provision at 30 CFR 761.5(c), as well as the remainder of Wyoming's rules refer to "surface coal mining operations." Thus, in order to maintain consistency with the terminology used in its VER rules, we required Wyoming to revise the proposed rule language to include the term "coal."

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the term "coal" in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 1, Section 2(f1)(iii) that applies its VER standard to all roads included within a surface mining operation. We also acknowledge Wyoming's commitment to revise the proposed rule language and add the term "coal" in a future rulemaking.

#### 4. Chapter 12, Section 1(a)(v)(D); Procedures for Public Road Waivers.

In response to Item F-1 of OSMRE's April 2, 2001, 732 letter,

Wyoming proposed to revise its rule regarding procedures for public road waivers at Chapter 12, Section 1(a)(v)(D) to be consistent with the Federal counterpart regulations at 30 CFR 761.14 by adding requirements for time limits and written findings.

OSMRE replied in a letter dated August 17, 2011, that Wyoming's proposed language warrants additional grammatical revisions for purposes of clarity and consistency within its rules.

Specifically, we stated that Wyoming needs to revise the phrase "shall follow notice and opportunity to for public hearing" to read "shall provide a public comment period and an opportunity to request a public hearing." We further noted that Wyoming needs to replace the word "authority" with "Administrator" to clarify that they are responsible for making written findings following a hearing or end of the public comment period.

Wyoming responded in a letter dated October 5, 2011, and stated that it will make the requested revisions in a future rule package.

As a result, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(v)(D) regarding procedures for public road waivers. We also acknowledge Wyoming's commitment to revise

the proposed rule and include the aforementioned grammatical revisions in a future rulemaking.

5. Chapter 12, Section 1(a)(vii)(A)(I); VER Submission Requirements and Procedures.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add VER submission requirements and procedure rules to be consistent with the Federal counterpart regulations at 30 CFR 761.16(b).

OSMRE replied in a letter dated August 17, 2011, that Wyoming's proposed language at Chapter 12, Section 1(a)(vii)(A) does not include Federal counterpart language explaining that a VER determination request shall be submitted if an individual "intends to conduct surface coal mining operations on the basis of valid existing rights under § 761.11 or wish to confirm the right to do so." Wyoming's failure to include this additional explanatory language in the proposed rule renders its program less effective than the Federal regulations. Similarly, for purposes of clarity and consistency within its rules and to be consistent with the Federal requirements at 30 CFR 761.16(b)(1) we required Wyoming to revise the proposed rule language in subsection (I) by adding citation cross-references to property

rights demonstrations under paragraph (i) of its VER definition in Chapter 1 for requests that rely on the good faith/all permits standard or the needed for and adjacent standard in paragraph (ii) of its VER definition in Chapter 1.

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the required cross-references and clarify that a request can be submitted if the individual intends to conduct surface coal mining operations on the basis of valid existing rights or wishes to confirm the right to do so in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(I) concerning VER determination requests. We also acknowledge Wyoming's commitment to revise the proposed rule to include the aforementioned citation cross-references and VER submission requirement language in a future rulemaking.

6. Chapter 12, Section 1(a)(vii)(A)(IV); VER Submission Requirements and Procedures.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add VER submission requirements and procedure

rules at Chapter 12, Section 1(a)(vii)(A)(IV).

OSMRE replied in a letter dated August 17, 2011, that in order to be consistent with its own rules and the Federal counterpart requirements at 30 CFR 761.16(b)(4) Wyoming must revise the proposed rule language in subsection (IV) by adding a citation cross-reference to paragraphs (iii)(A) through (iii)(C) of its VER definition in Chapter 1 regarding the standards for roads.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise subsection (IV) to include the aforementioned required citation cross-references in a future rule package.

Therefore, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(IV) concerning VER submission requirements and requests that rely on one of the standards for roads. We also acknowledge Wyoming's commitment to include the required citation cross-references in a future rulemaking effort.

7. Chapter 12, Section 1(a)(vii)(B)(I); Initial Review of VER Request.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed a new rule at Chapter 12, Section

1(a)(vii)(B)(I) requiring that responsible agencies conduct an initial review of a VER request and determine whether it includes all applicable submission components as discussed in subsection (A). The proposed rule also states that the review only examines completeness of the request.

OSMRE replied in a letter dated August 17, 2011, that in order to be consistent with the Federal regulations at 30 CFR 761.16(c)(1) Wyoming must include Federal counterpart language in subsection (I) to further explain that the review does not pertain to the "legal or technical adequacy of the materials submitted."

Wyoming's failure to include this qualifying explanatory language in the proposed rule renders its program less effective than the Federal regulations.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its rules to indicate that the review does not address legal or technical adequacy in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(I) concerning initial review of a VER request. We also acknowledge Wyoming's commitment to revise the proposed rule and include the aforementioned qualifying explanatory language in a future

rulemaking.

8. Chapter 12, Section 1(a)(vii)(B)(IV); Initial Review of VER Request.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add requirements to its rules at Chapter 12, Section 1(a)(vii)(B)(IV) for conducting an initial review of all applicable submission components for making VER determinations.

OSMRE replied in a letter dated August 17, 2011, that for purposes of clarity in its own rules and to be consistent with the Federal requirements at 30 CFR 761.16(c)(4) Wyoming must revise the proposed rule language in subsection (IV) regarding the VER demonstration by adding a citation cross-reference to subsection (D)(IV) that discusses how a VER decision will be made.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its rules with the appropriate citation cross-reference discussed above in a future rule package.

Accordingly, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(IV) concerning an initial



review of all applicable submission components for making VER determinations. We also acknowledge Wyoming's commitment to include the required citation cross-reference in a future rulemaking.

9. Chapter 12, Section 1(a)(vii)(C)(I)(3.); VER Notice and Comment Requirements.

In response to Item G-2 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add VER public notice and comment requirements and procedures to its rules at Chapter 12, Section 1(a)(vii)(C)(I)(3.).

OSMRE replied in a letter dated August 17, 2011, that in order to be consistent with its own rules and the Federal requirements at 30 CFR 761.16(d)(1)(iii) Wyoming must revise the proposed rule language in subsection (3.) by adding a citation cross-reference to include "the applicable standards under Chapter 1, VER definition." For the same reasons, Wyoming must revise the language in subsection (a.) to include a cross-reference to paragraph (ii) of its VER definition in Chapter 1 regarding the good faith/all permits standard or the needed for and adjacent standard, and change the citation cross-references in subsections (b.) and (c.) from (IV)(1.) and (IV)(2.) to (A)(IV)(1.) and

(A) (IV) (2.), respectively. Wyoming also needs to correct a typographical error for grammatical correctness in subsection (c.) by changing the word "creation" to "creating." Lastly, in order to maintain consistency within its own rules and the Federal requirements at 30 CFR 761.16(d) (1) (iv) we required Wyoming to revise the proposed rule language in subsection (d.) by adding a citation cross-reference to the standards in paragraphs (ii), (iii) (A), and (iii) (B) of its VER definition in Chapter 1.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its proposed rule language to include the citation cross-references discussed above and correct the typographical error in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rules concerning VER public notice and comment requirements and procedures at Chapter 12, Section 1(a) (vii) (C) (I) (3.). We also acknowledge Wyoming's commitment to include the required citation cross-references and correct a typographical error in a future rulemaking.

10. Chapter 12, Section 1(a) (vii) (C) (II) (2.); VER Notice and Comment Requirements.

In response to Item G-2 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(C)(II)(2.) by requiring that the Division provide a copy of the notice of an administratively complete VER request to the owner of the feature causing the land to come under VER protection and, where applicable, the agency with primary jurisdiction over the feature.

OSMRE replied in a letter dated August 17, 2011, that Wyoming does not include Federal counterpart language providing specific examples of such required notifications. Wyoming's failure to include this additional explanatory language in its proposed rule renders its program less effective than the Federal regulations at 30 CFR 761.16(d)(2)(ii). In addition, we noted that Wyoming needs to correct a typographical error for grammatical correctness by changing the phrase "where applicable" to "when applicable."

Wyoming responded in a letter dated October 5, 2011, and stated that it will amend its rules by providing specific examples of administratively complete VER request notifications and correct the aforementioned typographical error in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(II)(2.) concerning VER public notice and comment requirements and procedures. We also acknowledge Wyoming's commitment to revise its proposed rule by adding explanatory language and correcting a typographical error in a future rulemaking effort.

11. Chapter 12, Section 1(a)(vii)(C)(III); VER Notice and Comment Requirements.

In response to Item G-2 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(C)(III) by requiring that the letter transmitting notice of an administratively complete VER request also provide a 30-day comment period and specify that another 30 days is available upon request.

OSMRE replied in a letter dated August 17, 2011, that Wyoming does not include Federal counterpart language providing the Division with discretion to grant additional time to comment for good cause upon request, and fails to explain that the Division need not necessarily consider comments received after the closing date of the comment period. We further explained that this provision is not to be interpreted as providing Wyoming with

discretion to adopt the counterpart language. Rather, it is intended to afford Wyoming with the option to both extend the comment period for good cause requested and reject comments received after the comment period closes. Thus, Wyoming's failure to include this language in its proposed rule renders its program less effective than the Federal regulations at 30 CFR 761.16(d)(3).

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the Federal counterpart language mentioned above in a future rule package.

Consequently, we do not approve Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(III) concerning VER public notice and comment requirements and procedures. We also acknowledge Wyoming's commitment to revise its proposed rule by including Federal counterpart language affording Wyoming the option to both extend the comment period for good cause requested and reject comments received after the comment period closes in a future rulemaking.

12. Chapter 12, Section 1(a)(vii)(D)(I); How a VER decision will be made.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(D)(I) by requiring that the Division review materials and comments submitted for adequacy before making a VER determination.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its own rules and the Federal requirements at 30 CFR 761.16(e)(1) Wyoming must revise the proposed rule language in subsection (I) by adding citation cross-references to include "materials submitted under subsection (A)" and "comments received under subsection (C)."

Wyoming responded in a letter dated October 5, 2011, and stated that it will add the aforementioned required cross-references in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(I) concerning the review of materials and comments submitted for adequacy before making a VER determination. We also acknowledge Wyoming's commitment to include the required citation cross-references in a future rulemaking.

13. Chapter 12, Section 1(a)(vii)(D)(III); How a VER decision will be made.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(D)(III) regarding impacts of property rights disagreements on VER determinations.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its own rules and the Federal requirements at 30 CFR 761.16(e)(3)(i) Wyoming must revise the proposed rule language in subsection (1.) by adding citation cross-references to include "the closing date of the comment periods discussed under subsections (C)(I) or (C)(III) above." Similarly, to be consistent with 30 CFR 761.16(e)(3)(ii) Wyoming must revise subsection (2.) by adding citation cross-references to the requisite property rights demonstrations under paragraphs "(i), (iii)(A), or (iii)(B)" of its VER definition in Chapter 1, as appropriate. We also stated that Wyoming needs to specify that the Division is the "responsible agency" and correct a typographical error in the cross-reference from subsection (C)(II) to (D)(II). Lastly, for purposes of clarity and specificity, we required Wyoming to ensure that the "responsible

agency" reference is similarly revised, if applicable, when it appears elsewhere in the proposed rules.

Wyoming responded in a letter dated October 5, 2011, by stating that it will revise its rule to provide the appropriate citation cross-references and clarify that the Land Quality Division is the "responsible agency" in a future rule package.

Accordingly, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(III) concerning the impacts of property rights disagreements on VER determinations. We also acknowledge Wyoming's commitment to revise its rule and incorporate the required changes discussed above in a future rulemaking.

14. Chapter 12, Section 1(a)(vii)(E); Administrative and judicial review.

In response to Item G-1 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to add requirements to its rules at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations.



OSMRE replied in a letter dated August 17, 2011, that in order to provide clarity and specificity within its own rules and be consistent with the Federal requirements at 30 CFR 761.16(f) Wyoming must revise the proposed rule language by adding a reference to the Wyoming Administrative Procedures Act.

Wyoming's failure to include this reference in the proposed rule renders its program less effective than the Federal regulations.

Wyoming responded in a letter dated October 5, 2011, and stated that it will revise its rules to include a reference to the Wyoming Administrative Procedures Act in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations. We also acknowledge Wyoming's commitment to include a reference to the Wyoming Administrative Procedures Act in a future rulemaking.

15. Chapter 12, Section 1(a)(vii)(F); Availability of records.

In response to Item G-4 of OSMRE's April 2, 2001, 732 letter, Wyoming proposed to revise its rules at Chapter 12, Section 1(a)(vii)(F) by requiring that the Division or agency responsible

for processing a VER request shall make a copy of the request and related materials available to the public.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its rules, Wyoming needs to specify in the heading that the rule pertains to "Availability of Records." Moreover, Wyoming must add language explaining that, in addition to the VER request and related materials, records associated with any subsequent determination under subsection (D) shall also be made available to the public. Wyoming's failure to include this corresponding language in its proposed rule renders its program less effective than the Federal regulations at 30 CFR 761.16(g).

Wyoming responded in a letter dated October 5, 2011, by stating that it will revise its rules to include the section header "Availability of Records" and additional language regarding other materials which may be made available to the public.

Accordingly, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(F) concerning requirements for making VER requests and related materials available to the public. We also acknowledge Wyoming's commitment to revise the rule to address the required changes discussed above in a future

rulemaking effort.

16. Chapter 12, Section 1(a)(vii)(G)(III)(2.); Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.

In response to Item H-1 of OSMRE's April 2, 2001, 732 letter and to be no less effective than the Federal requirements at 30 CFR 761.17, Wyoming proposed new rules at Chapter 12, Section 1(a)(vii)(G) regarding procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places. Wyoming also proposed to clarify in subsection (III)(2.) that these procedures do not apply to lands within the scope of the exception for existing operations or to lands for which a person has VER.

OSMRE replied in a letter dated August 17, 2011, that in order to maintain consistency within its rules, Wyoming needs to revise the proposed rule language in subsection (2.) by adding a citation cross-reference to subsection (iv) to specify where the "exception for existing operations" is located in its Chapter 1, "valid existing rights" definition.

Wyoming responded in a letter dated October 5, 2011, and stated

that it will amend its rules to include the required cross-reference in a future rule package.

Based on the discussion above, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(G) concerning procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places. We also acknowledge Wyoming's commitment to add the aforementioned required citation cross-references in a future rulemaking effort.

17. Chapter 16, Section 4(a)(iii); Definition of "Willfully."

In response to a November 7, 1988, 732 letter, Wyoming proposed to add a new definition of "willfully" to its rules at Chapter 16, Section 4(a)(iii) to be no less effective than those of the Federal rules.

OSMRE replied in a letter dated August 17, 2011, and notified Wyoming that OSMRE revised this definition and moved it from 30 CFR 846.5 to 701.5 in a December 19, 2000, final rule Federal Register (65 FR 79656) notice. Specifically, OSMRE replaced the definition of "willful" with a similarly worded definition of "willful or willfully" to mean "that a person who authorized,

ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted: (1) intentionally, voluntarily, or consciously; and (2) with intentional disregard or plain indifference to legal requirements." OSMRE revised the text of the definition for clarity and consistency with the term's broader applicability. In addition, OSMRE replaced the word "individual" with "person" because the Act and Federal regulations define person in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this term.

Wyoming's proposed definition of "willfully" at Chapter 16, Section 4(a)(iii) means "that an individual acted: (A) intentionally, voluntarily, or consciously; and (B) with intentional disregard or plain indifference to legal requirements." While subsections (A) and (B) are identical to the Federal counterpart provisions, subsection (iii) does not include the revised Federal language defining "willful" to mean "a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation." Similar to Section 701(19) of SMCRA, Wyoming Statute W.S. 35-11-103(a)(vi) also defines the word "person" in a manner that includes both individuals and business entities.

Lastly, it should be noted that the language in Wyoming's proposed definition of "knowingly" at Chapter 16, Section 4(a)(i) is identical to the revised Federal definition language at 30 CFR 701.5. Thus, in order to maintain consistency with the terminology used in its proposed rules and be no less effective than the corresponding Federal regulations at 30 CFR 701.5, we required Wyoming to amend its proposed definition of "willfully" to include the revised language discussed above.

Wyoming responded in a letter dated October 5, 2011, by stating that it will revise its rules to include the additional language described above in a future rule package.

Based on the discussion above, we are not approving Wyoming's newly-proposed definition of "willfully" to its rules at Chapter 16, Section 4(a)(iii). We also acknowledge Wyoming's commitment to revise the rule and add the required language discussed above in a future rulemaking effort.

18. Chapter 16, Section 4(b)(i); When an individual civil penalty may be assessed.

Wyoming proposes new rules at Chapter 16, Section 4(b) for determining when an individual civil penalty may be assessed. In

subsection (i), Wyoming references its statutes at W.S. 35-11-902(b), "Surface coal mining operations; violations of provisions; penalties" in lieu of adopting Federal counterpart language at 30 CFR 846.12(a). In its Statement of Principal Reasons, Wyoming indicates that the statutory reference was in response to concerns expressed by the Wyoming Attorney General who stated in a review letter dated February 20, 2001, that most of the rules proposed by Chapter 16, Section 4, are already covered in W.S. 35-11-902.

In a November 7, 1988, 732 letter, OSMRE required Wyoming to adopt definitions of "knowingly," "willfully," and "violation, failure or refusal" to be no less effective than those of the Federal rules. Wyoming's proposed definition of "violation, failure or refusal" at Chapter 16, Section 4(a)(ii) is consistent with and no less effective than the Federal definition at 30 CFR 701.5. The referenced statutory language at W.S. 35-11-902(b) states, in pertinent part, that "Any person who violates, or any director, officer or agent of a corporate permittee who willfully and knowingly authorizes, orders or carries out the violation" is subject to an individual civil penalty. However, unlike the Federal regulation at 30 CFR 846.12(a) the statute does not specify that such penalties may also be assessed for "failure or refusal" to comply. Thus, in order to be consistent with its

proposed definition of "violation, failure or refusal" and no less effective than the corresponding Federal requirements at 30 CFR 846.12(a) Wyoming must either clarify how its reference to W.S. 35-11-902(b) addresses a "failure or refusal" to comply, or revise the language in proposed Chapter 16, Section 4(b)(i) by stating that that the Director may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out a violation, failure or refusal.

Wyoming responded in a letter dated October 5, 2011, by stating that it will amend its regulations to include the language discussed above provided it is determined that the Department of Environmental Quality has the authority to adopt that language in consideration of W.S. 35-11-902.

Consequently, we do not approve Wyoming's newly-proposed rules at Chapter 16, Section 4(b)(i) for determining when an individual civil penalty may be assessed. We also acknowledge Wyoming's commitment to revise the proposed rule and add the language discussed above in a future rulemaking effort if authorized to do so, or clarify how its reference to W.S. 35-11-902(b) addresses a "failure or refusal" to comply.



19. Chapter 16, Section 4(c)(i); Amount of Civil Penalty

In a November 7, 1988, 732 letter, OSMRE notified Wyoming that its rules concerning individual civil penalties were deficient. In response, Wyoming proposes new rules at Chapter 16, Section 4(c)(i) imposing criteria that shall be considered when determining the amount of the individual civil penalty to be assessed. Proposed subsection (A) requires the Director to consider the "individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface mining operation."

However, the Federal counterpart provision at 30 CFR 846.14(a)(1), as well as the remainder of Wyoming's rules refer to "surface coal mining operations." Thus, in order to maintain consistency with the terminology used in those rules, Wyoming must revise its proposed rule language to include the term "coal." Based on the discussion above, we are not approving Wyoming's newly proposed rule at Chapter 16, Section 4(c)(i)(A).

20. Chapter 16, Section 4(c)(ii); Amount of Civil Penalty

In a November 7, 1988, 732 letter, OSMRE notified Wyoming that its rules concerning individual civil penalties were deficient.

In response, Wyoming proposes a new rule at Chapter 16, Section 4(c)(ii) prescribing individual civil penalty amounts that cannot be exceeded for each day during which a violation, failure or refusal continues, including those for multiple violations. Specifically, Wyoming incorporates a reference to its statute at W.S. 35-11-902(b), "Surface coal mining operations; violations of provisions; penalties" which states, in pertinent part, that violators are "subject to either a penalty not to exceed ten thousand dollars (\$10,000.00) for each day during which a violation continues, or, for multiple violations, a penalty not to exceed five thousand dollars (\$5,000.00) for each violation for each day during which a violation continues \* \* \*." In its SOPR, Wyoming indicates that the statutory reference was made in response to concerns expressed by the Wyoming Attorney General who stated in a review letter dated February 20, 2001, that W.S. 35-11-902(b) provides a more detailed penalty assessment for individual offenses and daily offenses than did Wyoming's originally proposed rule language that mirrored the Federal rule.

The Federal counterpart language provides a maximum penalty amount for each violation and a separate individual penalty may be assessed for each day the violation, failure or refusal continues, but it does not specifically address multiple violations. Thus, Wyoming's reference to its statute at W.S. 35-

11-902(b) adds specificity and does not render its proposed rule at Chapter 16, Section 4(c)(ii) less effective than the corresponding Federal requirements at 30 CFR 846.14(b). Accordingly, we approve it.

21. Chapter 16, Section 4(d)(ii)(A); Procedure for Assessment of Individual Civil Penalty.

In a November 7, 1988, 732 letter, OSMRE notified Wyoming that its rules concerning individual civil penalties were deficient. In response, Wyoming proposes a new rule at Chapter 16, Section 4(d)(ii)(A) requiring an individual to file within 15 days of service of a notice of proposed individual civil penalty assessment a petition for review with the Environmental Quality Council. In its SOPR, Wyoming indicates that the 15-day petition for review timeframe was included in response to concerns expressed by the Wyoming Attorney General who stated in a review letter dated February 20, 2001, that the 30-day timeframe provided in Wyoming's originally proposed rule language that mirrored the Federal rule was less restrictive than W.S. 35-11-902(d) which specifically provides and allows for 15 days to request a conference.

The Federal counterpart language requires an individual to file

within 30 days of service of a notice of proposed individual civil penalty assessment a petition for review with the U.S. Department of the Interior's Office of Hearings and Appeals. Wyoming's 15-day timeframe to petition for review of a notice of proposed individual civil penalty assessment is both consistent with its statutory requirement at W.S. 35-11-902(d) and more stringent than the Federal 30-day timeframe. As such, Wyoming's proposed rule at Chapter 16, Section 4(d)(ii)(A) is no less effective than the corresponding Federal requirements at 30 CFR 846.17(b) and we approve it.

D. Removal of Required Amendments.

1. Required Amendment at 30 CFR 950.16(r), Disposal of Noncoal Wastes.

In an October 29, 1992 Federal Register (57 FR 48984) notice, we required Wyoming to either reinstate the removed cited reference "disposal of noncoal wastes shall be in accordance with the standards set out in Section 11, paragraph c., Solid Waste Management Rules and Regulations (1980)" or otherwise amend its rules to be no less effective than the Federal regulations at 30 CFR 816.89 and 817.89. Wyoming had revised its existing rule at Chapter 2, Section 3(a)(v)(A)(II) (now codified at Chapter 2,

Section 2(a)(v)(A)(II)) by adding the modified definition of Solid Waste Management Facility contained in W.S. 35-11-103(d)(ii)(D) and by removing the requirement that noncoal wastes shall be disposed of in accordance with the Solid Waste Management Rules and Regulations. Additionally, the proposed rule would require facilities receiving solid waste that is generated outside the proposed permit area by any activity other than a mine-mouth power plant or mine-mouth coal drier to follow the Solid Waste Management Rules of Article 5 of the Environmental Quality Act (EQA).

The proposed rules were disapproved primarily because of the removal of specific performance standards for noncoal mine waste disposal as approved by the OSMRE in Wyoming's original program. Moreover, the proposed Statute change of Article 5 of the EQA did not contain Federal counterpart rules to the Federal requirements at 30 CFR 816.89 and 817.89. Consequently, we determined that Wyoming's proposed rules regarding solid waste permitting and management for mines were less effective than the corresponding Federal regulations.

Wyoming explains in its SOPR that in November of 1990, the Solid Waste Management Program revised its rules by removing Section 11, paragraph c. from the Solid Waste Rules and Regulations in

response to the Wyoming Legislature eliminating duplication of jurisdiction for mine site solid waste disposal. The (now repealed) rules contained language which was very similar to the Federal Rules at 30 CFR 816.89, Disposal of noncoal mine wastes. OSMRE requested that the original reference to these rules be reinstated. However, Wyoming states that the rules are no longer a part of the current Solid and Hazardous Waste Management Division Rules and Regulations and cannot be referenced in the LQD Rules and Regulations.

In response to the required program amendment at 30 CFR 950.16(r), Wyoming proposes to revise its rules at Chapter 2, Section 2(a)(v)(A) by referring to the "Solid and Hazardous Waste Management Division." Wyoming also proposes to revise subsection (II) by adding a cross-reference to its newly proposed rules at Chapter 4, Section 2(c)(xiii)(C) that provide standards for noncoal waste disposal and are no less effective than Federal regulation requirements at 30 CFR 816.89 and 817.89. Wyoming explains in its SOPR that the proposed rule language more appropriately explains which DEQ Division has authority over facilities other than those handling mine generated noncoal waste, and that the counterpart Federal rules now proposed for adoption in Chapter 4 also apply to such "within permit" disposal of off-site wastes.

Wyoming's proposed revisions makes its rules at Chapter 2, Section 2(a)(v)(A)(II) no less effective than the Federal regulations at 30 CFR 816.89 and 817.89, and we are removing the required program amendment at 30 CFR 950.16(r).

2. Required Amendments at 30 CFR 950.16(s) and (t), Specific Performance Standards for Noncoal Waste Disposal.

In an October 29, 1992 Federal Register (57 FR 48984) notice, we required Wyoming to submit revisions to its rules at Chapter 2, Section 3(b)(xxi) and (xxii) (now codified at Chapter 2, Section 5(a)(xx) and (xxi), respectively) to provide and/or include specific performance standards for noncoal waste disposal that are no less effective than the Federal Regulations at 30 CFR 816.89 and 817.89.

In response to required program amendments at 30 CFR 950.16(s) and (t), Wyoming proposes to revise its rules at Chapter 2, Section 5(a)(xx) by requiring that each application for a surface coal mining permit contain a plan for the management and disposal of noncoal mine waste within the proposed permit area in accordance with its newly-proposed rules at Chapter 4, Section 2(c)(xiii)(C) that provide standards for noncoal waste disposal

and are no less effective than the Federal requirements at 30 CFR 816.89 and 817.89.

Wyoming also proposes to remove its rule at Chapter 2, Section 5(a)(xxi) regarding plans for the management and disposal within the permit area of any solid wastes generated by a mine mouth power plant or mine mouth coal drier. Wyoming states in its SOPR that the rule is being proposed for deletion because separate rules regarding solid wastes generated by a mine mouth power plant, coal drier or coal processing facility are no longer necessary. Wyoming further explains that these types of facilities are now addressed with the inclusion of language in proposed Chapter 2, Section 5(a)(xx) regarding solid wastes generated by a mine mouth power plant, coal drier or coal processing facility. Wyoming also notes that "noncoal mine waste" is interpreted by the LQD to exclude coal mine dust and coal fines which may be generated during the processing of coal. Specifically, coal dust and fines may be recovered and therefore are not considered waste.

Based on the foregoing, Wyoming's proposed revisions to its rules at Chapter 2, Section 5(a)(xx) and (xxi) are no less effective than the Federal regulations at 30 CFR 780.11(b), 816.89 and



817.89, and we are removing the required program amendments at 30 CFR 950.16(s) and (t).

3. Required Amendment at 30 CFR 950.16(s) and (t), Specific Performance Standards for Noncoal Waste Disposal.

In an October 29, 1992 Federal Register (57 FR 48984) notice, we required Wyoming to submit revisions to its rules at Chapter 4, Section 2(c)(v) and Section 3(c)(iii)(C) and (D) (now codified at Chapter 4, Section 2(c)(xiii)(C) and (D), respectively) to provide and/or include specific performance standards for noncoal waste disposal that are no less effective than the Federal Regulations at 30 CFR 816.89 and 817.89.

In response to the required program amendments at 30 CFR 950.16(s) and (t), Wyoming proposes new rules at Chapter 4, Section 2(c)(xiii)(C)(I)-(III) that provide specific performance standards for temporary storage of noncoal mine wastes, final disposal of noncoal mine wastes, and restrictions as to where noncoal mine waste can be deposited. Wyoming also incorporates the requirements of former Section 2(c)(v) into newly-proposed Chapter 4, Section 2(c)(xiii)(C)(I) and (II) under "Disposal of noncoal mine wastes." Subsections (I) and (III) of Wyoming's proposed rules regarding temporary storage and deposition

restrictions for noncoal mine wastes are substantively identical to and no less effective than the Federal counterpart requirements at 30 CFR 816.89 and 817.89(a) and (c), and we are approving them.

Wyoming's proposed rule language in subsection (II) regarding final disposal of noncoal mine wastes requires that when the disposal is completed, a minimum of four feet of suitable cover material shall be placed over the site. The Federal counterpart language requires that a minimum of two feet of soil cover shall be placed over the site when the disposal is completed. In its SOPR, Wyoming explains that a burial depth of four feet above any noncoal mine waste disposal site is required to ensure that the disposed materials are never exposed at the final reclaimed surface. Wyoming acknowledges that this requirement is more stringent than the minimum of two feet of soil cover required by Federal Rules at 30 CFR 816.89(b). However, for the types of wastes that will be buried and the fact that some amount of erosion takes place on reclaimed land in the arid West, Wyoming believes that four feet of cover plus subsoil and topsoil, is necessary to prevent buried materials from making their way to the soil surface.

Wyoming also explains that its proposal requiring that suitable material be used for burial purposes rather than "soil cover" as required by the OSMRE rules is intended to clarify that topsoil and subsoil should not be used for burial purposes. Wyoming adds that the four feet can be comprised of suitable spoil or other approved material which is nontoxic, nonacid-forming and noncombustible, and the approved depth of subsoil/topsoil shall be placed above the four feet of suitable cover material.

We agree with Wyoming's rationale justifying the adoption of a four foot burial depth above disposal sites using of suitable cover material in lieu of soil cover. These provisions are reasonable and are more stringent than the Federal counterpart requirements at 30 CFR 816.89 and 817.89(b). Therefore, we approve subsection (II) of newly proposed Chapter 4, Section 2(c)(xiii)(C).

Wyoming also proposes to remove its rule at Chapter 4, Section 2(c)(xiii)(D) regarding management and final burial on the permit area of solid wastes generated by a mine mouth power plant or mine mouth coal drier. Wyoming explains in its SOPR that subsection (D) is no longer necessary because these types of facilities are now addressed with the inclusion of language in proposed Chapter 4, Section 2(c)(xiii)(C)(II) regarding solid

wastes generated by a mine mouth power plant, coal drier or coal processing facility. Wyoming notes that "noncoal mine waste" is interpreted by the LQD to exclude coal mine dust and coal fines which may be generated during the processing of coal.

Specifically, coal dust and fines may be recovered and therefore are not considered waste. We agree with Wyoming's proposed rule change and approve it.

Based on the discussion above, Wyoming's proposed revisions to its rules at Chapter 4, Section 2(c)(xiii)(C) and (D) are no less effective than the Federal regulations at 30 CFR 816.89 and 817.89, and we are removing the required program amendments at 30 CFR 950.16(s) and (t).

Related to the findings above is Wyoming's proposal to add a new rule at Chapter 7, Section 2(b)(ix) regarding Environmental Protection Performance Standards Applicable to Underground Mining Operations. In its SOPR, Wyoming's explains that proposed subsection (ix) provides a specific cross-reference to the noncoal mine waste management and performance standards in Chapter 4 Section 2(c) and is intended to make clear that they are applicable to underground mining operations as required by 30 CFR 817.89. Wyoming also states that the additional subsection will eliminate the need for adoption of a separate set of

duplicate rules regarding noncoal mine waste generated by underground coal mines. We find that Wyoming's proposed rule applying noncoal mine waste management and performance standards to underground mining operations is no less effective than the Federal requirements at 30 CFR 817.89 and we approve it.

#### **IV. Summary and Disposition of Comments**

##### Public Comments

We asked for public comments on the amendment (Administrative Record Document ID No. OSM-2011-0004-0001), but did not receive any.

##### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Wyoming program (Administrative Record No. WY-45-03). We received comments from three Federal Agencies.

The United States Geological Survey (USGS) commented in a May 10, 2011, e-mail response (Administrative Record Document ID No. OSM-

2011-0004-0008), the Mine Safety and Health Administration (MSHA) commented in a June 1, 2011, letter (Administrative Record Document ID No. OSM-2011-0004-0006), and the Bureau of Land Management (BLM) commented in a June 3, 2011, letter (Administrative Record Document ID No. OSM-2011-0004-0005).

The USGS responded that inasmuch as they aren't a regulatory agency, they do not have a major role for commenting on these rule changes. The USGS further stated that a copy of the amendment materials was forwarded to the Central Energy Resource (coal group), Wyoming Water Science Center (water), and Fort Collins (wildlife and habitat) Science Centers for their review. The USGS concluded by stating they would forward to OSMRE any comments that were received from those groups.

MSHA responded that it reviewed the proposed changes to the Wyoming Reclamation Program and had no comments or concerns.

The BLM responded that the proposed Wyoming Reclamation Program amendment materials were reviewed by BLM staff in the Field, District, and State Offices and it did not have any comments at this time.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.).

Under 30 CFR 732.17(h)(11)(i), OSMRE requested comments on the amendment from EPA (Administrative Record No. WY-45-03). EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On July 1, 2011, we requested comments on Wyoming's amendment (Administrative Record No. WY-045-06), but neither responded to our request.

**V. OSMRE's Decision**

Based on the above findings, we approve, with certain exceptions, Wyoming's April 28, 2011, amendment. We do not approve the

following provisions or parts of provisions.

As discussed in Finding No. III.C.1, we are not approving Wyoming's revised VER definition at Chapter 1, Section 2(f1).

As discussed in Finding No. III.C.2, we are not approving Wyoming's newly-proposed "Needed for and adjacent standard" definition at Chapter 1, Section 2(f1)(ii)(B)(IV).

As discussed in Finding No. III.C.3, we are not approving Wyoming's proposed rule change at Chapter 1, Section 2(f1)(iii) that applies its VER standard to all roads included within a surface mining operation.

As discussed in Finding No. III.C.4, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(v)(D) regarding procedures for public road waivers.

As discussed in Finding No. III.C.5, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(A)(I) concerning VER determination requests.

As discussed in Finding No. III.C.6, we are not approving Wyoming's proposed rule change at Chapter 12, Section



1(a)(vii)(A)(IV) concerning VER submission requirements and requests that rely on one of the standards for roads.

As discussed in Finding No. III.C.7, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(I) concerning initial review of a VER request.

As discussed in Finding No. III.C.8, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(B)(IV) concerning an initial review of all applicable submission components for making VER determinations.

As discussed in Finding No. III.C.9, we are not approving Wyoming's proposed rules concerning VER public notice and comment requirements and procedures at Chapter 12, Section 1(a)(vii)(C)(I)(3.).

As discussed in Finding No. III.C.10, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(C)(II)(2.) concerning VER public notice and comment requirements and procedures.

As discussed in Finding No. III.C.11, we are not approving Wyoming's proposed rule change at Chapter 12, Section

1(a)(vii)(C)(III) concerning VER public notice and comment requirements and procedures.

As discussed in Finding No. III.C.12, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(I) concerning the review of materials and comments submitted for adequacy before making a VER determination.

As discussed in Finding No. III.C.13, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(D)(III) concerning the impacts of property rights disagreements on VER determinations.

As discussed in Finding No. III.C.14, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(E) providing for administrative and judicial review of VER determinations.

As discussed in Finding No. III.C.15, we are not approving Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(F) concerning requirements for making VER requests and related materials available to the public.

As discussed in Finding No. III.C.16, we are not approving

Wyoming's proposed rule change at Chapter 12, Section 1(a)(vii)(G) concerning procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.

As discussed in Finding No. III.C.17, we are not approving Wyoming's newly-proposed definition of "willfully" to its rules at Chapter 16, Section 4(a)(iii).

As discussed in Finding No. III.C.18, we are not approving Wyoming's newly-proposed rules at Chapter 16, Section 4(b)(i) for determining when an individual civil penalty may be assessed.

As discussed in Finding No. III.C.19, we are not approving Wyoming's newly-proposed rule at Chapter 16, Section 4(c)(i)(A) imposing criteria that shall be considered when determining the amount of the individual civil penalty to be assessed.

We are removing existing required amendments and approving, as discussed in: Finding No. III.D.1, Chapter 2, Section 2(a)(v)(A)(II) concerning disposal of noncoal wastes; Finding No. III.D.2, Chapter 2, Section 5(a)(xx) and (xxi) concerning specific performance standards for noncoal waste disposal; and Finding No. III.D.3, Chapter 4, Section 2(c)(xiii)(C) and (D)

concerning specific performance standards for noncoal waste disposal.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 950, which codify decisions concerning the Wyoming program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### Effect of OSMRE's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSMRE for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSMRE. In the oversight of the Wyoming program, we will recognize only the statutes, regulations and other materials we have approved, together with any consistent

implementing policies, directives and other materials. We will require Wyoming to enforce only approved provisions.

## **VI. Procedural Determinations**

### Executive Order 12630 - Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

### Executive Order 12866 - Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

### Executive Order 12988 - Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a

specific State, not by OSMRE. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

#### Executive Order 13132 - Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

## Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. The rule does not involve or affect Indian tribes in any way.

## Executive Order 13211 - Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

### National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 CFR U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) *et seq*).

### Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

### Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such



regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

#### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was

prepared and a determination made that the Federal regulation was not considered a major rule.

#### Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 950

Intergovernmental relations, Surface mining, Underground mining.

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Allen D. Klein  
Regional Director  
Western Region

June 26, 2012

Date

Editorial Note: This document was received at the Office of the Federal Register on February 8, 2013.

For the reasons set out in the preamble, 30 CFR part 950 is amended as set forth below:

PART 950 - Wyoming

1. The authority citation for part 950 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

2. Section 950.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

§ 950.15 Approval of Wyoming regulatory program amendments.

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Original	Date of final	Citation/description
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amendment submission date	publication
* * * * *	* *
April 28, 2011	<p>[<u>Insert date</u> <u>of</u> <u>publication</u> <u>in the</u> <u>Federal</u> <u>Register</u>]</p> <p>Chap. 1, Sec. 2 (f1) (i); Chap. 1, Sec. 2 (f1) (ii) (A) and (B) (I) - (III); Subsections (A) - (D) of Chap. 1, Sec. 2 (f1) (iii); Chap. 1, Sec. 2 (f1) (iv) (A) and (B); Chap. 2, Sec. 2 (a) (v) (A) (II); Chap. 2, Sec. 5 (a) (xx) and (xxi); Chap. 4, Sec. 2 (c) (xiii) (C) and (D); Chap. 7, Sec. 1 (a) (i) (A) and (B); Chap. 7, Sec. 2 (b) (ix);</p>

Chap. 10, Sec. 2(a);  
Chap. 10, Section  
2(b)(xiii);  
Chap. 10, Sec. 3(c)(iv);  
Subsections (1.)-(9.) of  
Chap. 12, Sec.  
1(a)(vii)(A)(I);  
Chap. 12, Sec. 1(a)(v)(B);  
Chap. 12, Sec. 1(a)(vi);  
Chap. 12, Sec.  
1(a)(vii)(A)(II) (1.)-(3.)  
and (III);  
Subsections (1.)-(3.) of  
Chap. 12, Sec.  
1(a)(vii)(A)(IV);  
Chap. 12, Sec.  
1(a)(vii)(B)(II) and (III);  
Chap. 12, Sec.  
1(a)(vii)(C)(I)(1.) and  
(2.);  
Subsections e.-h. of Chap.  
12, Sec.  
1(a)(vii)(C)(I)(3.);

Chap. 12, Sec.

1(a)(vii)(C)(II)(1.);

Chap. 12, Sec.

1(a)(vii)(D)(II);

Chap. 12, Sec.

1(a)(vii)(D)(IV) and

(V)(1.) and (2.);

Chap. 12, Sec.

1(a)(vii)(G)(I)(1.), (2.),

and (3.), (II), and

(III)(1.);

Chap. 16, Sec. 4(a)(i) and

(ii)(A) and (B);

Chap. 16, Sec. 4(b)(ii);

Chap. 16, Sec. 4(c)(i)(B) -

(C);

Chap. 16, Sec. 4(c)(ii);

Chap. 16, Sec. 4(d)(i),

(ii)(A) and (B), and (iii);

Chap. 16, Sec. 4(e)(i) -

(iii);

also all minor, editorial,

and codification changes.

3. Section 950.16 is amended by removing and reserving paragraphs (r), (s), and (t).

[FR Doc. 2013-03365 Filed 02/13/2013 at 8:45 am; Publication Date: 02/14/2013]